IN THE

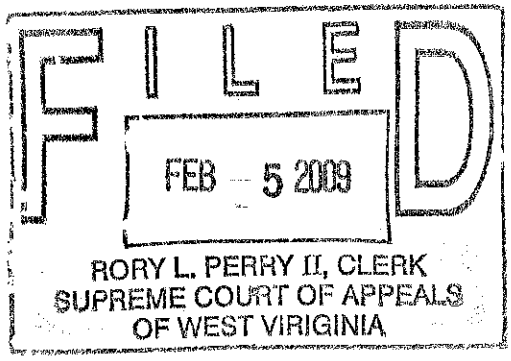
SUPREME COURT OF APPEALS

OF

WEST VIRGINIA

CHARLESTON

No. 34595



State of West Virginia, *ex rel.*
WARREN D. FRANKLIN,
Appellant,

v.

CASE NO. 06-C-377-2
Habeas Corpus
Prior Felony No. 86-238-2

THOMAS MCBRIDE, Warden,
Mt. Olive Correctional Center,
Appellee.

APPELLANT'S REPLY BRIEF

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TABLE OF AUTHORITIES

Cases

Appellant does not intend to reply to every issue raised by the State in its brief. The omission of arguments should not be construed as signifying abandonment of any issue raised in Appellant's original brief or as a concession to any argument made by the Respondent in its brief. This *Reply Brief* is focused upon one issue: ***The Respondent, in its brief, argues that Appellant failed to prove that "The testimony adduced by the State at his trial was perjurious."***

ARGUMENT

As stated in the primary brief for Appellant: *Prison authorities, for the most part, saw very little of what was happening and constructed versions of the facts largely through the statements of the inmates once order was restored.*

Franklin contends that the State should have known that its witnesses were lying when they gave conflicting statements against him, and that he had no motive to kill Kent Slie. There is no way of proving, objectively or scientifically, that the inmate witnesses lied during Franklin's criminal trial or that they told the truth during his *habeas corpus* hearing. There is, however, objective evidence that John Perry was murdered in the Harrison County Jail. While the record does not disclose that anyone was tried for his murder and we will never know what he would have said, had he been called to testify on behalf of Red Snyder, it is a reasonable to believe that he had said that he was going to implicate Snyder in the death of Kent Slie.

Likewise, we know that Snyder was acquitted of the murder of Slie. Now that Snyder is dead, inmates Peacher and Gibson say Snyder killed Slie but they kept quiet out of fear for their lives. They can be presumed to know that they risk prosecution for false swearing, by speaking out. In the absence of current testimony from witnesses for the Respondent that Franklin, in fact did kill Kent Slie, it is an issue to be determined solely by the trier of the facts – the *Habeas* Court. The only evidence presented supports Petitioner.

The *Habeas* Court's Findings of Fact were clearly wrong. The only evidence presented on Franklin's behalf was completely contradictory to the State's case in the criminal trial. The *Habeas* Court could not properly evaluate the truthfulness of the trial witnesses since either they were unavailable or they were not produced by the Respondent. In the *Habeas* Court's conclusions, he relies upon an assumption that the Prosecuting Attorney acted appropriately and that Counsel for the Petitioner did not identify the corrections officers who "knew he did not commit the murder."

How can a prisoner in Franklin's position ever conclusively prove this allegation? In *Losh v. McKenzie*[1], Justice Neely listed "the knowing use by the State of perjured testimony" as one ground that, if proven, should lead to a grant of a writ of *habeas corpus.* Must Petitioner prove actual knowledge? In a

1 *Losh v. McKenzie,* 166 W.Va. 762, at 770, 277 S.E.2d 606 (1981)

criminal case, the jury must determine whether a witness is credible. Since the Trial Court is the trier of fact in *habeas corpus,* is the determination of the credibility of witnesses purely the Court's discretion?

Citing *State v. Bailey*[2], Respondent argues that the jury, in the felony trial, was "the trier of the facts." The following is an excerpt from the *Bailey* opinion:

> The jury had before it for its consideration all of the evidence pertaining to Hall's role in this incident. The necessary inference of the testimony of two witnesses . . . caused the jury to believe that Hall did not commit the crime. The only facts proved to the satisfaction of the jury preclude any inference of Hall's guilt. The jury is the trier of the facts and in performing that duty it is the sole judge as to the weight of the evidence and the credibility of the witnesses.

The twin problems for Franklin were (1) the jury didn't hear his witnesses, and (2) the *State* knowingly used perjured testimony.

In *Miller v. Pate,*[3] the U. S. Supreme Court said:

> More than 30 years ago this Court held that the Fourteenth Amendment cannot tolerate a state criminal conviction obtained by the knowing use of false evidence. There has been no deviation from that established principle. There can be no retreat from that principle here.

We reiterate the argument from the primary brief: there is no denying that the State faced a difficult investigation into the death of Kent Slie; all of the

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2 *State v. Bailey,* 151 W.Va. 796, 155 S.E.2d 850 (1967)

3 *Miller v. Pate,* 386 U.S. 1, 87 S.Ct. 785 (1967). *See, also: Mooney v. Holohan,* 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed. 791 (1935); *Napue v. People of State of Illinois,* 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959); *Pyle v. State of Kansas,* 317 U.S. 213, 63 S.Ct. 177, 87 L.Ed. 214 (1942); *Alcorta v. State of Texas,* 355 U.S. 28, 78 S.Ct. 103, 2 L.Ed.2d 9 (1957).

witnesses were convicted criminals and co-conspirators in the riot. In essence, every witness called by the State was an informer.

> By definition, criminal informants are cut from untrustworthy cloth and must be managed and carefully watched by the government and the courts to prevent them from falsely accusing the innocent, from manufacturing evidence against those under suspicion of crime, and from lying under oath in the courtroom.[4]

Of course, Petitioner's witnesses were, of necessity, cut from the same cloth. If the Court would consider remanding this case to have Franklin and his witnesses submit to polygraph examinations, the undersigned would stipulate to their admissibility in this case. Petitioner sought to take the testimony of a former corrections officer who was, at the time of the habeas proceedings, employed at the old Moundsville Penitentiary as an interpreter of the facility for visitors. He could not be found when Petitioner's investigator sought to serve him with a subpoena, but Petitioner asks the Court to permit Counsel to make another attempt to serve him, should the case be remanded.

CONCLUSION

When witnesses who clearly had reason to keep silent at the time of trial come forward, in a *habeas corpus* proceeding, and give testimony that directly contradicts the testimony of other inmate witnesses at the criminal trial, and when those witnesses withstand cross-examination, the *habeas* court must take them seriously. When there are serious problems with a companion criminal trial, such

4. *U.S. v. Bernal-Obeso*, 989 F.2d 331 (9th Cir. 1993)

as the murder of a witness who was in a position to give testimony favoring the *habeas* petitioner at a post-trial hearing, the *habeas* court must take that evidence seriously.

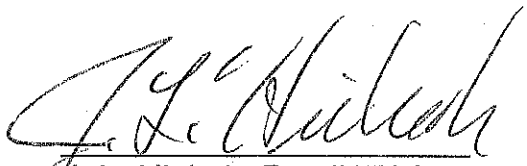
When the only witnesses who implicated the *habeas* petitioner at his criminal trial were inmates who were vulnerable to retaliation by a brutal killer, the *habeas* court must seriously consider that not only is it likely that they perjured themselves, the prison personnel must have known that they were committing perjury, fearing violent death more than the threat of criminal prosecution.

Petitioner cannot prove, objectively, that those who were responsible for prosecuting him for the murder of Kent Slie knew, objectively and to a certainty, that their most important witnesses were lying, but the weight of the evidence in this case is that they should have known it, and it is a reasonable conclusion that, in fact, those closest to the scene had to know that the decision to prosecute Warren D. Franklin was arbitrary, if not malicious.

Petitioner prays that you overturn the decision of the *habeas* Court, set aside his conviction for murder and order a new trial.

Respectfully submitted,

Warren D. Franklin,
By Counsel



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CERTIFICATE OF SERVICE

I, J. L. Hickok, counsel of record for Warren D. Franklin, hereby certify that on the 4th day of February, 2008, I served a copy of the foregoing *Reply Brief* upon the following, at their respective addresses and in the manner noted below:

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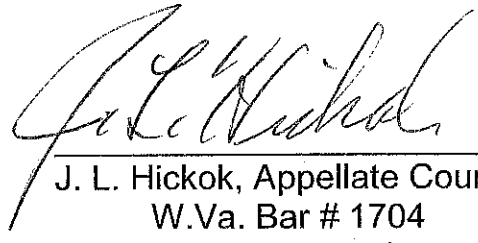

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